IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1279

THE WILLIAMS & WILKINS CO.,
Petitioner

v.

THE UNITED STATES, *Respondent*

BRIEF OF THE SOCIETY FOR INDUSTRIAL AND APPLIED MATHEMATICS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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The Society for Industrial and Applied Mathematics respectfully submits that subject matter of the above entitled matter is of sufficient importance to publishers of learned journals and to the scientific community that it warrants review by the Supreme Court of the United States. The Society therefore supports the Petition of The Williams & Wilkins Co. for a Writ of Certiorari to the U. S. Court of Claims in this proceeding. This *amicus* brief in support thereof is filed with the consent of the parties.

THE INTEREST OF THE AMICUS

The Society for Industrial and Applied Mathematics (SIAM) is a non-profit corporation with 3600 members. It publishes seven journals of articles on mathematical developments of interest to its members and to others in the scientific community. Circulation extends throughout the world; in aggregate there are over 10,000 subscriptions.

The Society is independent of any outside control, and the contents of its publications are subject only to the judgment of peers in the several disciplines of applied and industrial mathematics.

SIAM submits that the questions presented in this case are of sufficient importance to the scientific community in general and SIAM in particular to warrant review and decision by the Supreme Court of the United States. The Society, therefore, supports the Petition for the grant of a Writ of Certiorari.

SIAM has not taken, and does not here take, a position on the merits of this case. Its Trustees are, however, of the opinion that the doctrine of "fair use" requires review, in light of recent and foreseeable technological developments that have and will substantially alter the circumstances under which the doctine was originally applied, since the extent of allowable "fair use" is important to its operations. Once this Court has spoken on the subject, SIAM will have a basis on which to plan its publishing activities, or to develop other means of acquiring and disseminating, from and to its members and other interested parties, the results of research and development in mathematics.

ARGUMENT

To preserve its independence and to insure the continuance of its activities, including the distribution of its publications, SIAM must carefully plan its operations so that its membership dues and subscription fees provide adequate support, but are low enough to encourge membership and subscriptions. Anything which changes the assumptions on which the Society's funding and allocation of resources are based can affect the amount of dues required, the subscription prices, or even the viability or existence of one or more of SIAM's journals and the existence of these media for publication of the results of research and the reciprocal availability of these results to others. The doctine of "fair use" and the recent significant changes in the technology of copying both impact on the management assumptions of the Society. Any definition or application of "fair use" should take account of the current state of relevant technology, otherwise the Society will lack a rational basis for its operation.

Methods of copying, especially Xerography, have developed to the point where the ability to have a machine make, in seconds and for a pittance, one or many copies of almost any printed work is within the reach of almost anyone who wishes to avoid the labor of a physical transcription. The physical effort that was once a necessary part of copying has largely disappeared, and with it has gone one of the implicit limits on "fair use." The subject matter to which the present rule is directed has so changed that the rule itself should be re-examined.

The existing statements of the rule, and decisions thereunder such as that of the Court of Claims in this case, do not take into account these technological changes; and therefore do not give the necessary guidance to organizations, like SIAM, in planning and carrying out the provision of media for the presentation and acquisition of the results of scientific research and development. The practical operation of SIAM requires a delicate balance

among such factors as the supply of technical and scientific papers, the availability of media, the needs of the scientific community for information, the type of media available, and the costs and revenue incidental thereto. To achieve this balance, SIAM should have guidelines, either judicial or legislative, that reflect the realities of technology and enable it to predict the consequences of alternative policies.

In the instant case, the Court of Claims, at pp. 18-19 of its opinion, aptly states the question generated by the recent revolution in reproduction technology to be "whether the marked increase in volume changes a use which was generally accepted as 'fair' into one which has now become 'unfair'." It is the answer to this (and similar questions) that are important to organizations such as SIAM.

The Court of Claims did *not* directly answer this question. Instead, it held that in this particular case, on this set of facts, the Respondent's use was "fair." It based its decision on the traditional factors that until now were taken to underlie "fair use," but without reference to the new technological circumstances in which the doctrine was being applied. The Court considered the possible harm to Petitioner of the Respondent's practices and the possible injury to medical research by inhibiting the practices complained of. On balance, the opinion of the Court below was a "holding action" pending a legislative determination of the relative weights to be given the interests of authors and of users.

The Court of Claims did not re-examine the doctrine of "fair use" in the light of recent technological developments. It did not attempt to modify or in anyway accommodate the rule to the practical impact of photo-copying on the publication of learned journals, but considered only the importance of the use (assuming the continued availability) of these journals to the individual researcher, and limited its analysis to the medical field.

The court below stated, at p. 125 of its opinion, "Intermediate or compromise solutions are not within our authority." But is this really so?

— the doctrine of "fair use" was, itself, a compromise solution to problems raised by a literal construction of the statute, and reflected the way researchers utilized scientific articles.

— for the doctrine of "fair use" to remain constant, it must continue to reflect the realities of the world in which it is used. It could and should change from time to time, as technology changes, to provide a uniform policy of accommodation between conflicting rights.

The time for re-examination of the doctrine of "fair use" is ripe. The question of the impact of new technology on this rule of law is clearly presented by the facts. The relevant near- and intermediate-term technological developments are generally known and understood. Their impact on copying and, in turn, on the publication and use of learned journals in *all* fields of science should be considered. Except to the extent that the Supreme Court feels that the question is solely for the legislature, it can review the rule, and recast it, if necessary, to preserve or to modify the prior relationship among publisher, authors and users.

CONCLUSION

This case presents the opportunity for a definitive statement by the Supreme Court of the impact, if any, of changes in the technology of copying on the doctrine of "fair use." This is necessary so that learned societies such as SIAM, to whom the extent of "fair use" of their journals is important, can proceed with or change their methods of serving their respective scholarly communities.

The Society for Industrial and Applied Mathematics therefore supports Petitioner in urging the review of this case by the Supreme Court to clarify or define, for all concerned, the interrelated doctrines of infringement and "fair use" in the context of a changed and changing world.

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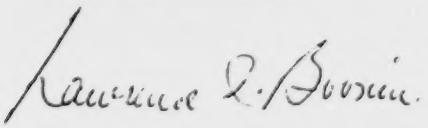
March 6, 1974

Respectfully submitted,



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